Supreme Court, U.S.
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(1)

No.

IN THE

Supreme Court of the United States

SANAE KOHIKI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Ninth Circuit's ruling that a declaration from a co-defendant who did not testify at trial is not "newly discovered evidence" was erroneous because it conflicts with the "interest of justice" standard of Rule 33 of Federal Rules of Criminal Procedure, which permits the district court to grant a new trial if the "interest of justice" so requires.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, Petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are, in addition to those listed in the caption above:

Leo Sarabia
Barry Cohen
David Canter

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The decision of the Court of Appeals is unpublished and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-3a. The Court of Appeals decision denying a rehearing en banc is unpublished and reprinted at Pet. App. 4a. The District Court opinion is unpublished and reprinted at Pet App. 5a-8a. The Judgment and Probation/Commitment Order is reprinted at Pet. App. 9a-11a.

JURISDICTION

Petitioner's Petition for Rehearing En Banc was denied on June 26, 2007 by the Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Federal Rules of Criminal Procedure Rule 33 Provides:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered

evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

STATEMENT OF THE CASE

A. Introduction

This case raises an important issue regarding the ability of criminal defendants to rely upon exculpatory statements made by co-defendants who do not testify at trial in a Motion for New Trial brought pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Petitioner Sanae Kohiki was convicted of mail fraud in violation of 18 U.S.C. §§ 2 and 1341. At her trial, none of her alleged co-conspirators testified despite the fact that the government had entered into cooperation agreements with two of the co-conspirators. Moreover, the government forced the third co-conspirator to go to trial even though he had offered to plead guilty to most of the charges against him and would have allowed the District Court to sentence him on the remaining charges as relevant conduct.

Subsequent to her conviction, two of Petitioner's co-defendants provided testimony under oath that Petitioner was not part of the fraud for which she was convicted. This petition concerns the testimony offered by co-defendant Leo Sarabia, who provided a post-trial declaration which, consistent with statements he made upon his arrest, unequivocally exonerated Petitioner.

The District Court ruled that the post-trial Sarabia Declaration did not constitute "new evidence" supporting a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Pet App. 7a. The Ninth Circuit, relying upon the rule announced in *United States v. Diggs*, 649 F.2d 731, 740 (9th Cir. 1981), *overruled on other grounds, United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (en banc), affirmed the ruling of the District Court and held that a declaration offered by a co-defendant who did not testify at trial cannot qualify as "newly discovered evidence" under Rule 33. Pet. App. 3a.

The Ninth Circuit's approach of categorically excluding all post-trial exculpatory evidence from a co-defendant who did not testify at trial conflicts with the holding of at least one other Circuit and the "interest of justice" standard of Rule 33. In *United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997), the First Circuit rejected the Ninth's Circuit's approach in *Diggs* and held that evidence which was unavailable to a defendant during trial because a co-defendant invoked his Fifth Amendment privilege against self-incrimination is nonetheless "newly

discovered." The Court held that this conclusion is most consistent with the "interest of justice" standard set forth in Rule 33. *Id.* at 1066.

This Court should grant certiorari in order to resolve this conflict between the Circuits and to harmonize existing law with the "interest of justice" language contained in Rule 33. By its plain meaning, the "interest of justice" language permits courts to consider evidence which may warrant a new trial that was unavailable at trial through no fault of the defendant, including evidence which was unavailable because a co-defendant chose not to testify. The categorical approach taken by the Ninth Circuit and other Circuits frustrates this intent.

The Ninth Circuit's interpretation is also inconsistent with the principles set forth by this Court most recently in *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Holmes*, this Court reiterated that rules which exclude an entire category of defense evidence from consideration and are arbitrary or disproportionate to the interests they are designed to serve are disfavored. *Id.* at 324-325. The rule announced in *Diggs* is precisely this type of rule. It excludes exculpatory evidence offered by co-defendants who did not testify even in circumstances where the rationale underlying the creation of the rule would not be served. Unless certiorari is granted, courts will be powerless to grant a new trial even though the exculpatory evidence offered by a co-defendant appears reliable and trustworthy, as was the case here.

Certiorari is also necessary to prevent the type of injustice which occurred in this case. At Petitioner's trial, the government took steps to ensure that Petitioner would not get the benefit of exculpatory testimony from any of her alleged co-conspirators. Criminal defendants who are deprived of exculpatory evidence from their co-defendants at trial because of the actions of the government should not be precluded from making a motion for new trial based on the very evidence the government was able to keep from the jury.

B. Factual Background

The fraud at the center of this case as alleged by the government involved three separate business entities – Universal Bancom, Nissan Bancorp, and Pacific Bancom. ER 2. These companies would solicit customers and represent that they could obtain major credit cards for people with poor credit for a fee of $300. The companies maintained phone banks where the potential customers would call in, be promised regular credit cards for a fee, and then be instructed to mail or overnight the funds to the credit restoration company. There were no arrangements for credit cards, and these companies simply took the funds without providing the promised credit cards. ER 2-6.

The original co-schemers who started the fraudulent credit restoration companies were John Sarabia and his attorney Barry Cohen, who formed and ran the first two companies, Universal Bancom and Nissan Bancorp. ER 223. After Universal

Bancom and Nissan Bancorp were operating, Leo Sarabia, John Sarabia's brother, set up a copycat "credit restoration company" called Pacific Bancom. ER 251. Leo Sarabia was an experienced con-man who had recently been released from custody and was on probation. ER 90, 242.

Petitioner, a Japanese exchange student who was finishing her final semester at California State University at Northridge, met Leo Sarabia in a stationary supply store and entered into a romantic relationship with him. ER 70-71. Leo Sarabia convinced Petitioner to loan him money that her parents had given her so he could set up Pacific Bancom, which he described to her as a business to help poor people. ER 77, 82, 392.

Petitioner testified at trial that she participated in setting up the company by signing the lease, helping to buy furniture, and working for various periods at the company. ER 79-36, 83. Petitioner testified she believed that Pacific Bancom was a legitimate company that was providing a service to the poor. ER 82. Petitioner testified that she had a personal falling out with Leo Sarabia and left Pacific Bancom after working for approximately three months in the summer and early fall of 2000. ER 86. Petitioner intermittently saw Leo Sarabia socially, but had no more involvement in Pacific Bancom after she left. ER 86.

John Sarabia was the first person to be arrested by the government in connection with the above frauds. He agreed to cooperate with the

government and give full and complete honest testimony in exchange for a reduced charge and sentence. The government negotiated a deal with John Sarabia to plead guilty to one count of failing to pay withholding taxes on his employees in exchange for a recommendation of a 12-month sentence with no provision for restitution to the victims. ER 406-407.

Based on the investigation and information provided by John Sarabia, Leo Sarabia and Barry Cohen were both arrested. At the time of his arrest, Leo Sarabia informed the arresting agents that Petitioner was not part of the fraud. ER 163. John Sarabia also told the government that Petitioner was not involved in the fraud prior to Petitioner's trial.[1]

Cohen agreed to cooperate with the government in exchange for a reduction in charges and a lenient sentencing recommendation. ER 116-118. Cohen agreed to plead to one count of mail fraud in exchange for a recommendation of 18 months in custody, with the possibility of restitution relating to the one entity for which he pled guilty. ER 116-118. Cohen's sentencing was continued until after Petitioner's trial. ER 35-36.

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[1]The District Court ruled in connection with Petitioner's second new trial motion that John Sarabia never made this exculpatory statement to the government, despite his testimony under oath at the second new trial hearing to the contrary. ER 291-293. The Ninth Circuit in Petitioner's first appeal found the District Court did not abuse its discretion in making such a finding. ER 374.

Before trial, Leo Sarabia offered to plead guilty to all of the charges against him except those related to Nissan Bancorp. However, he offered to let the District Court determine his involvement with Nissan Bancorp as relevant conduct at the time of sentencing. ER 32-34, 356-357. The government rejected this offer and the District Court eventually accepted his guilty plea as to all the fraudulent entities except Nissan Bancorp. Consequently, Leo Sarabia was required to stand trial on the Nissan Bancorp charges. ER 357.

C. Proceedings Below

Petitioner and Leo Sarabia were jointly tried. The government did not call any of its cooperating witnesses as part of its case. Instead, the government's case against Petitioner was based primarily on the testimony of employees who worked at Pacific Bancom, most of whom were in college or high school and were unaware of the fraud which was occurring.

Petitioner was eventually convicted of mail fraud with respect to four of the fifteen counts for which she was charged. ER 114-115.

Petitioner appealed her conviction on the grounds of judicial misconduct committed by the District Court judge, the Hon. Manuel Real, prosecutorial misconduct, and various erroneous evidentiary rulings made by the District Court after the two new trial motions she filed were denied. The Ninth Circuit upheld Petitioner's conviction but

remanded the case for re-sentencing in light of this Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). ER 374.

After remand but before the re-sentencing of Petitioner, Leo Sarabia submitted a detailed, six-page declaration setting forth how his relationship with Petitioner developed, the fact that she was totally ignorant of the fraudulent nature of Pacific Bancom, and that he was very concerned that his conduct had destroyed the life of an innocent person. ER 390-395. Leo Sarabia also stated in this declaration that shortly after the trial, he wrote a letter to the District Court judge informing him that Petitioner was innocent. ER 394. The District Court, however, never indicated to the defense or the government that he received this letter. It also has not denied that such a letter was received.

Leo Sarabia further stated in his declaration that the only reason he did not testify at trial in order to exonerate Petitioner was because his counsel informed him that such testimony would only serve to "enrage" the District Court judge. ER 394.[2]

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[2]The Ninth Circuit did find with respect to Petitioner's judicial misconduct claim in her first appeal that the District Court asked an inappropriate question during Petitioner's testimony. ER 374. However, the Ninth Circuit found that any prejudice resulting from the inappropriate question was cured by a subsequent instruction given by the District Court. ER 374. Thus, there was evidence to support Leo Sarabia's contention in his declaration that his testimony could have angered the District Court judge.

Petitioner brought a renewed motion for new trial based on the declaration of Leo Sarabia. The District Court denied the motion, finding in relevant part that Petitioner had not submitted any "'new evidence' supporting a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure." Pet. App. 7a.

On May 16, 2007, the Ninth Circuit upheld the District Court's ruling. Relying upon *United States v. Diggs*, 649 F.2d 731, 740 (9th Cir. 1981), the Ninth Circuit held that the declaration from Petitioner's co-defendant could not qualify as newly discovered. Pet. App. 3a. Petitioner's request for rehearing en banc was denied on June 26, 2007. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

This case raises an extremely important question of federal law relating to a criminal defendant's use of exculpatory statements made by a co-defendant who did not testify at trial as basis for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Ninth Circuit in this case ruled that exculpatory statements made by a co-defendant who did not testify at trial can never constitute "newly discovered evidence" regardless of the reasons why the co-defendant did not testify. In essence, the Ninth Circuit has drawn an arbitrary distinction between evidence which was unavailable at trial because the co-defendant exercised his Fifth Amendment privilege and other types of exculpatory evidence which are not discovered until after trial.

Such a ruling conflicts with the interest of justice standard enunciated in Rule 33 and inappropriately limits the discretion of the district court to grant a new trial based on evidence which, through no fault of the defendant, he or she could not present at trial.

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONGST THE CIRCUITS OVER WHAT QUALIFIES AS "NEWLY DISCOVERED" EVIDENCE.

The Courts of Appeals are in conflict over the issue of whether exculpatory testimony from a co-defendant who did not testify at trial can qualify as "newly discovered evidence" for purposes of granting a new trial pursuant to Rule 33. The majority of Circuits have joined the Ninth Circuit in ruling the "newly discovered evidence" does not encompass evidence which was unavailable because a co-defendant did not to testify at trial. *See e.g. United States v. Theodosopoulos*, 48 F.3d 1438, 1448-1450 (7th Cir. 1995); *United States v. Muldrow*, 19 F.3d 1332, 1339 (10th Cir. 1994); *United States v. DiBernardo*, 880 F.2d 1216, 1224-1225 (11th Cir. 1989); *United States v. Metz*, 652 F.2d 478, 480-481 (5th Cir. 1981); *United States v. Dale*, 991 F.2d 819, 838-839 (D.C. Cir. 1993); *United States v. Jasin*, 280 F.3d 355, 368 (3d Cir. 2002); *United States v. Owen*, __F.3d __ 2007 WL 2472019 at 6-7 (2d Cir. 2007).

The First Circuit, however, has rejected the holdings of these Circuits. In *United States v. Montilla-Rivera, supra*, the First Circuit concluded

that given the "interest of justice" standard contained in Rule 33, there is little distinction between evidence which a defendant could not present because he did not know of it and evidence he could not present because the witness was unavailable despite exercising due diligence. *Montilla-Rivera*, 115 F.3d at 1066.

The Circuits which have joined the Ninth Circuit in concluding that unavailable evidence by reason of a co-defendant's assertion of his Fifth Amendment privilege does not constitute newly discovered evidence have done so for primarily two reasons. First, as most recently expressed earlier this month in *United States v. Owen*, *supra*, the language of Rule 33 contemplates granting a new trial based on "newly discovered evidence" and not newly unavailable evidence. *Owen*, 2007 WL 2472019 at 6; *see also Jasin*, 280 F.3d at 368. Second, evidence from co-defendants who choose not to testify at trial is inherently untrustworthy and should not be encouraged. *See e.g. United States v. Reyes Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992); *United States v. Freeman*, 77 F.3d 812, 817-818 (5th Cir. 1996). Both of these rationales highlight why review by this Court is necessary.

With respect to the first rationale, review is necessary to determine the interplay between Rule 33's "newly discovered evidence" and "interest of justice" language. The First Circuit has essentially used the "interest of justice" language to broaden the scope and meaning of the term "newly discovered evidence" to include evidence which was unavailable

at trial though no fault of the defendant. The other Circuits, however, ignore the "interest of justice" language altogether and just focus on the "newly discovered evidence" language in isolation. *See e.g. Jasin*, 280 F.3d at 368; *Owens*, 2007 WL 2472019 at 6; *Theodosopoulos*, 48 F.3d at 1448-1449. The *Montilla-Rivera* court's interpretation most faithfully adheres to basic principles of statutory construction by looking at the entire text of Rule 33, not just the "newly discovered evidence" language, to effectuate the meaning of the rule. The approach of the other Circuits, including that of the Ninth Circuit, inappropriately limits, and potentially makes superfluous, the "interest of justice" language.

The First Circuit's interpretation of Rule 33 is also most consistent with the principles set forth by this Court most recently in *Holmes v. South Carolina*, *supra*. In *Holmes*, this Court expressed disfavor with "rules that infring[e] upon a weighty interest of the accused and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324-325. This Court went on to disapprove of evidentiary rules that were not rooted in "any rational justification for the wholesale exclusion of ... potentially exculpatory evidence." *Id.* at 325.

The Ninth Circuit's and the other Circuits' categorical ban on exculpatory statements made by co-defendants who do not testify at trial is precisely the kind of judicially created rule that is arbitrary and disproportionate to the purposes it is designed to serve. There is no practical difference between evidence which is unavailable because of a

defendant's Fifth Amendment privilege and evidence which is first discovered after trial. Both types of evidence cannot be presented at trial through no fault of the defendant. The distinction created by a majority of the Circuits is therefore arbitrary.

The rule established by the Ninth Circuit and other Circuits is also disproportionate to the purposes which led to the creation of the rule. The fact that exculpatory statements from co-defendants who choose not to testify at trial may be unreliable is not a sufficient justification for their wholesale exclusion. *See Washington v. Texas*, 388 U.S. 14, 22 (1967) (disapproving of "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.") The sounder approach is to treat this evidence with great skepticism in the context of all the prongs which must be satisfied in order for a new trial to be granted. For instance, the district court would be free to conclude that such evidence was "unlikely to result in acquittal upon retrial" (*Montilla-Rivera*, 115 F.3d at 1065) if it appears not to be trustworthy or reliable.

As it stands, however, district courts outside of the First Circuit have no authority to grant a new trial based on the exculpatory testimony of a co-defendant who does not to testify at trial, even if the testimony appears to be material, trustworthy and likely to result in a new trial. Ultimately, it is irrational and contrary to the interest of justice standard to not grant a new trial based on evidence that otherwise satisfies the requirements for granting

a new trial merely because it was unavailable as opposed to newly discovered.

This case illustrates the injustice that can occur when exculpatory statements made by co-defendants who did not testify at trial are categorically banned from consideration in a motion for new trial. In this case, Petitioner was deprived of the benefit of any testimony from her alleged co-conspirators despite the fact that there was evidence that both before and after her trial, two of the co-conspirators made statements exonerating her. The fact that Petitioner did not get the benefit of this testimony at her trial had nothing to do with her lack of diligence. One of the co-conspirators who would have exonerated Petitioner was a cooperating witness that the government chose not to call. The other alleged co-conspirator, Leo Sarabia, could have been available to testify if the government did not require him stand trial on meaningless charges. Thus, the witnesses who had actual, first-hand knowledge of the fraud and the participants to the fraud were prevented from testifying and the District Court was powerless to consider their testimony after Petitioner's trial.

While it may be true that a co-defendant could take the blame for a crime after he has been convicted and sentenced in order to help another co-defendant, it also may be true that the co-defendant is being forthright and honest in accepting blame. It should be left to the discretion of the district court to make this determination based on its evaluation of all the circumstances and facts of the case. The rule

created by the Circuit Courts of Appeals ties the hands of the district court in a manner not supported by the text of Rule 33. This is further reason why this petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: September 24, 2007

Respectfully submitted,

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